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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-09-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

O.S.A.NO.75 OF 2001

Robert Prabhakar .. Appellant/Plaintiff

Vs.

David Ebenezer .. Respondent/Defendant

Appeal filed under Order 36 Rule 1 of O.S. Rules against the judgment of the learned single Judge dated 5.9.2000 made in T.O.S.No.28 of 1988.

For Appellant : Mr.N.D. Bahety
For Respondent : Mr.S.V. Jayaraman
Senior Advocate for
Mr.V.G. Suresh Kumar

- - -

J U D G M E N T

P.K. MISRA, J

Plaintiff is the Appellant.

2. Plaintiff had filed the Testamentary Original Suit No.28 of 1988 in the Original Side of the Madras High Court praying for grant of probate in respect of an unregistered Will dated 22.3.1987 allegedly executed by his mother late Mrs.D. Logambal. Defendant / Respondent is the elder brother of the plaintiff. At the time when the petition for grant of probate was filed, i.e., on 18.10.1988, the father of the parties Mr.Dyvadheenam was alive. He has filed an affidavit in support of the plaintiff's case for grant of probate. In the written statement, the case of the defendant is to the effect that the Will was not executed by the deceased mother of the parties and taking advantage of the signature of the deceased in a blank paper, such Will has been subsequently executed by the plaintiff and the plaintiff's brother-in-law (wife's brother). It is also indicated that in March, 1987, the deceased D. Logambal, the mother of the parties, was bedridden as her spinal cord had been badly affected and she was not in a sound and disposing state of mind.

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3. Learned single Judge, on the above pleadings, framed the following issues :-

"1. Whether the Will propounded by the plaintiff dated 23.3.1987 is a true, genuine and a valid one ?

2. Whether the Will was executed by the deceased D. Logambal voluntarily and in a sound state of mind and health ?

3. Whether the signature under the Will dated 22.3.1987 obtained in a blank paper and the contents thereof filled up subsequently ?

4. Whether the appointment of the beneficiary under the said Will as Executor is lawful ?

5. To what reliefs are the parties entitled to ?

4. Plaintiff examined himself as P.W.1 and his brother-in-law, who had scribed the Will and also signed as an attesting witness, was examined as P.W.2 and the friend of P.W.2., who was the other attesting witness, was examined as P.W.3. Defendant examined himself as a witness.

5. The learned single Judge, while discussing all the issues together, disbelieved the due execution of the Will. The main reasonings given by the learned single Judge are as follows :-

1. The materials on record did not indicate that under Ex.P-2, the so called deed of family settlement, any property was given to the defendant and no document was produced to show that the conditions stated in Ex.P-2 had been complied with.

2. The Testatrix had signed only in the first page of Ex.P-1 Will and there is no signature in the second page, even though there is continuation of the Will in the second page and there is no explanation from the plaintiff (P.W.1) as to why the testatrix did not sign the second page.

3. Even though the father of the parties was alive, he had not attested the Will and according to the plaintiff his father came to know about the Will only after the death of his mother.

4. The evidence of P.Ws. 2 and 3 that the testatrix's husband took part in the preparation of the Will is contradicted by the plaintiff himself, who stated that his father came to know of the Will only after the death of the testatrix.

5. There is no reason as to why the testatrix chose P.W.2.,the brother-in-law of the plaintiff, who was practically a stranger, for writing the Will.

6. Evidence of the scribe, P.W.2., indicates that testatrix signed the Will only after the attestors signed the Will and as such the evidence of the scribe does not establish the valid execution and attestation of the Will.

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7. There is no convincing evidence that the defendant was provided with some properties and that is the reason why he is disinherited under the Will.

8. The evidence of P.W.3 does not corroborate with the evidence of P.W.2 relating to scribing of the document and it is surprising that he was called as an attesting witness, even though he was a stranger to the family.

9. There are contradictions in the evidence of P.Ws.2 and 3 in respect of the valid execution of the Will.

10. The evidence of P.Ws. 1 to 3 indicates that execution of the Will is surrounded by suspicious circumstances and the valid execution and attestation had not been proved.

11. The description or schedule of the property has not been given in the document.

6. In this appeal, the learned counsel appearing for the appellant has challenged the reasonings given by the learned single Judge and has contended that probate should have been granted by the learned single Judge.

7. It is of course true that some of the reasonings given by the learned single Judge do not appear to be justified. For example, the conclusion of the learned single Judge to the effect that there is no evidence as to why the defendant was excluded and that there is no evidence that some property at Hyderabad had been given to the defendant cannot be accepted.

From Ex.P-2, the agreement of family settlement, it is apparent that during the life time of the father and the mother, they had settled some properties with the defendant. Similarly, there is ample evidence on record to indicate that the defendant was staying apart from his parents and the plaintiff. These materials indicate that possibly there was enough reason for excluding the defendant. Similarly the conclusion of the learned single Judge that schedule of the property has not been given in the document is not sustainable because the property itself had been described in the body of the Will and not appending a formal schedule is not very material.

However, the fact that there is some motive or reason for excluding a person from the Will is not sufficient proof for the due execution of the Will. Law is well settled that even in the absence of any suspicious circumstance, a person who propounds the Will has to prove the due execution and attestation of the Will.

8. In the present case, the due execution and attestation of the Will was sought to be proved through P.W.2., the scribe and P.W.3., an attesting witness. P.W.1., the plaintiff admittedly was not present at the time of execution of the Will. Therefore, his evidence would not have any direct bearing on the execution

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and attestation of the Will. However, from his evidence it is apparent that his father became aware of the Will for the first time after the death of the testatrix. P.W.1 has stated :

> "I do not know whether my father was aware of the execution of Ex.P.1. ... Only on 11.05.1987, after the prayer meeting regarding the death of my mother, my father came to know of the Will."
> (Admittedly the mother had died on 26.4.1987).

9. The question as to whether the father of the plaintiff (husband of the Testatrix) was aware of the execution of the Will or was present at the time of execution of the Will assumes great importance in view of the categorical evidence of P.W.2 and P.W.3 to the effect that the father of the parties was present at the time of execution of the Will.

P.W.2 even in his examination in chief has stated

> "At the time of Ex.P1 was executed, Logambal, her husband, myself and my friend Ekambaram were present. Logambal signed Ex.P1 Will in the presence of all of us."

In cross-examination, he has further stated :

> "Logambal's husband took part in the preparation of the Will. ... Devathinan was not an attesting witness of Ex.P1."

(Devathinan is the husband of the testatrix and the father of the parties).

He has further stated :

> "Only myself and Logambal's husband were present at the time when Logambal given instruction for writing the Will."

To a specific question as to why the husband of the testatrix had not attested the Will, it was stated by P.W.2.,

> "Because Devathinan has given oral consent we did not ask him to attest the Will."

10. P.W.3., the attesting witness, has stated :-

> "Ex.P1 bears my signature. I do not know who wrote the document. Logambal signed the document. At the time when Logambal signed Ex.P1 document, Logambal, her husband, PW2 and myself were present. ... I was present and sitting outside when instructions were given by Logambal to P.W.2 regarding the Will inside the room. ... At the time when instructions are given to the Will Plaintiff's father alone was present. ... I don't know why Logambal's husband Deivadeenam did not sign as attestor in the Will."

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Thus, the evidence of P.W.2 and P.W.3 show as if the husband of the testatrix was present at the time of giving instructions for writing the Will and at the time when such Will was signed by the testatrix.

11. In normal course, one would have expected the husband of the testatrix to be an attesting witness. As already noticed, the evidence of the plaintiff indicates as if his father came to know of the Will for the first time after the death of the testatrix. This obviously contradicts the categorical evidence of the scribe and the attesting witness that the Will has been prepared and executed in the presence of the father of the plaintiff - husband of the testatrix. Even though one may explain away such contradiction on this vital aspect as possible loss of memory or confusion on the part of the plaintiff, the document Ex.P-5 produced by the plaintiff completely belies the presence of his father at the time of preparation and execution of the Will.

12. The Will was allegedly executed on 22.3.1987. Ex.P-5 is the complaint dated 30.3.1988 given by G. Dyvadheenam, the father of the parties and the husband of D. Logambal, against his own son (Defendant) before the Sub-Inspector of Police. In such complaint, it is stated :-

> "Our house 24, Chinnababu street was purchased by me in the name of my wife. She has expired on 26.4.87. Now the said G. Davit-Ebenezer wants to forcibly enter my house.
>
> He has no connection with us for nearly 21 years. I have also executed a settlement with him in 1974, according to which he has no claim on our property.
>
> He gave us lot of trouble in Hyderbad joining his wife's side. He wanted even to arrange our murder so we sold away our beautiful Bungalow in Hyderbad for a low sum and came away.
>
> He wants to do the same thing here also as my wife has expired and he thinks he has a right over our house.
>
> As per our settlement executed at Hyderbad, he has no claim over our property."

The significant factor which is clearly evident from this complaint, admittedly filed by the father, is that there is no whisper in such complaint regarding execution of the alleged Will by the wife. If actually the Will was prepared and executed in the presence of the father by the testatrix, in whose name the property had been purchased, the father would have referred to such Will. It is significant to note that after filing of such complaint on 30.3.1988, plaint has been filed only a few days thereafter, i.e., on 18.4.1988. It is also significant to note that such complaint was also signed by the plaintiff. If the Will was in existence, the plaintiff as well as his father would not have failed to indicate about such Will in the complaint.

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13. Apart from the aforesaid tell-tale feature, the evidence of P.W.2 and P.W.3 raise sufficient doubt regarding the due execution and attestation of the Will as has been noticed by the learned single Judge. P.W.2., the scribe, who is none other than the brother-in-law of the plaintiff (wife's brother), has stated :

> "It is not true to say that the contents of Ex.P1 was written so closely in order to adjust with the place available in the paper in which Logambal had already signed. Logambal did not sign in the second page because there is no procedure like that and she has signed after the attestors have signed."
>
> (Emphasis added)

P.W.3 in his evidence has stated :-

> "I don't know why Logambal has signed only in the first and she has not signed in the second page."

In this context, it is also required to be noticed that P.W.2 has stated :

> "Logambal knew Ekambaram (P.W.3) only on 22.3.1987, when he attested the document. Logambal did not instruct me to bring two witnesses from outside."

The fact is that P.W.3 is an utter stranger to Logambal and yet he was brought as an attesting witness. Incidentally, it may be noticed that P.W.3 is a friend of P.W.2, who is the brother-in-law of the plaintiff. P.W.2 claim that Logambal consulted him for writing the Will. It is admitted by him in his evidence,

> "Only after the marriage, I knew about the petitioner's mother, Logambal. ... Logambal consulted me for writing the Will. I consulted lawyer for writing the Will. I did not take Logambal to the lawyer nor the lawyer to Logambal. ... My acquaintance with Logambal was one week only prior to Ex.P1."

From the aforesaid evidence of P.W.2., it is doubtful as to why he was consulted by the testatrix for preparation and execution of the Will.

14. The evidence of P.W.2 as well as the other attesting witness, namely, P.W.3 creates a lot of doubt regarding the due execution of the Will and such evidence on the side of the plaintiff does not establish the due execution of the Will.

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15. In view of the aforesaid discussion, though some of the reasonings given by the learned single Judge do not appear to be correct, we affirm the decision of the learned single Judge as, in our opinion, the silence in Ex.P-5 regarding execution of any Will creates a lot of doubt regarding the genuineness of the Will. The appeal is accordingly dismissed. However, there would be no order as to costs.

dpk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub Assistant Registrar, Original Side, High Court, Madras.

2. The Record-keeper, V.R. Section, High Court, Madras.

+ 2 ccs to Mr .M. D. Bahety, Advocate SR No. 46293

HPR(CO)
SR/27.10.2006

JUDGMENT IN OSA.NO.75/2001

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